

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROYA FERDOWSNIA,	)	Case No. 11-0720 SC
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	<u>MOTION TO REMAND</u>
v.	)	
	)	
STANDARD INSURANCE COMPANY;	)	
STEVE POIZNER as COMMISSIONER OF	)	
INSURANCE; and DOES 1-20,	)	
inclusive,	)	
	)	
Defendants.	)	
	)	
	)	

**I. INTRODUCTION**

This matter comes before the Court on the Motion to Remand filed by Plaintiff Roya Ferdowsnia ("Plaintiff"). ECF No. 9 ("Mot."). Defendant Standard Insurance Company ("Defendant" or "Standard") filed an Opposition, and Plaintiff submitted a Reply. ECF Nos. 19, 20. For the following reasons, Plaintiff's Motion is GRANTED.

**II. BACKGROUND**

This action arises out of an individual long-term disability insurance policy Standard issued to Plaintiff (hereinafter, "the Policy"). Plaintiff is a California resident. ECF No. 1 ("Notice of Removal") ¶ 15. Standard is an Oregon corporation with its

1 principal place of business in Oregon. Id. ¶ 23.

2 Plaintiff alleges the following facts. While Plaintiff was  
3 employed as a dental hygienist, she purchased the Policy, which  
4 purported to provide monthly benefits if she became unable to  
5 perform her regular occupation due to a covered disability.  
6 Coleman Decl. ¶ 2 Ex. A ("FAC") ¶¶ 4-6.<sup>1</sup> Plaintiff became disabled  
7 as a result of, inter alia, upper extremity pain and carpal tunnel  
8 syndrome while the Policy was in effect. Id. ¶ 7. On March 12,  
9 2009, after paying benefits for a period of time, Standard denied  
10 Plaintiff's claim for continued disability benefits despite the  
11 fact that Plaintiff was and remains unable to work as a dental  
12 hygienist. Id. ¶ 8.

13 On March 9, 2010, Plaintiff filed this action in San Francisco  
14 County Superior Court. Mot. at 2. She asserted claims for breach  
15 of contract and bad faith against Standard for the alleged wrongful  
16 termination of her disability benefits. FAC ¶¶ 13-23. She also  
17 asserted a claim for writ of mandamus against the Commissioner of  
18 the California Department of Insurance ("Commissioner"). Id. ¶¶  
19 24-30. She alleged that the Policy contained misleading provisions  
20 and that the Commissioner abused his discretion by approving the  
21 policy in contravention of California Insurance Code Section  
22 10291.5.<sup>2</sup> Id. ¶ 28. Plaintiff thus sought a writ of mandamus

23 <sup>1</sup> Terrence J. Coleman ("Coleman"), attorney for Plaintiff, filed a  
24 declaration in support of the instant Motion. ECF No. 10.

25 <sup>2</sup> Section 10291.5 of the California Insurance Code gives the  
26 Commissioner the power to disapprove certain disability insurance  
27 policies. Specifically, subparagraph (b)(1) provides that "the  
28 commissioner shall not approve any disability policy for insurance  
... if the commissioner finds that it contains any provision ...  
[that] is unintelligible, uncertain, ambiguous, or abstruse, or  
likely to mislead a person to whom the policy is offered, delivered  
or issued." Cal. Ins. Code § 10291.5(b)(1).

1 compelling the Commissioner to withdraw approval of the Policy and  
2 associated forms either entirely or to the extent that their  
3 provisions violate the California Insurance Code. Id.

4 On June 7, 2010, Standard filed a special demurrer arguing  
5 that joinder of the Commissioner as a defendant was improper  
6 because: (1) Plaintiff's claims against Standard were unrelated to  
7 her claim against the Commissioner; and (2) Plaintiff's claim  
8 against the Commissioner was invalid as a matter of law. Coleman  
9 Decl. ¶ 3 Ex. B ("Standard's Demurrer"). The court overruled the  
10 demurrer on July 12, 2010, finding that the claims were  
11 sufficiently related. Id. Ex. C. ("Order Overruling Standard's  
12 Demurrer"). In doing so, the court declined to rule on the  
13 validity of Plaintiff's claim against the Commissioner, noting, "I  
14 don't think I can or should resolve the validity of the mandate  
15 cause of action in the absence of the party against whom that is  
16 directed and that party, for whatever reason, has chosen to answer  
17 the complaint." Id. Ex. D ("July 12, 2010 Hearing Tr.") at 2:15-  
18 18.

19 On January 19, 2011, the Commissioner moved to dismiss  
20 Plaintiff's mandamus claim, and Standard joined the Commissioner's  
21 motion. Ellinikos Decl. Ex. E ("Commissioner's MTD"), Ex. F  
22 ("Standard's Joinder in Commissioner's MTD").<sup>3</sup> At a February 15,  
23 2011 hearing, the Court issued a tentative ruling granting the  
24 Commissioner's motion. Id. Ex. H ("Feb. 15, 2011 Hearing Tr.") at  
25 13:23-25. The court instructed counsel for the Commissioner to  
26 prepare a proposed order consistent with the court's tentative

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28 <sup>3</sup> Maria Ellinikos ("Ellinikos"), attorney for Standard, filed a  
declaration in support of the Opposition. ECF No. 19-2.

1 ruling. Id. at 13:27-14:1. A few hours after the hearing, before  
2 the proposed order had been submitted to the court for entry,  
3 Standard removed the action to federal court on diversity grounds  
4 pursuant to 28 U.S.C. §§ 1332(a) and 1441(b). Coleman Decl. ¶ 4;  
5 see also Notice of Removal. Plaintiff now moves to remand the case  
6 back to state court.

### 7 8 **III. LEGAL STANDARD**

9 Any civil action brought in a state court may be removed to  
10 federal court if there is complete diversity of citizenship and the  
11 amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1332, 1441.  
12 As a general rule, the court must strictly construe the removal  
13 statute, "and any doubt about the right of removal requires  
14 resolution in favor of remand." Moore-Thomas v. Alaska Airlines,  
15 Inc., 553 F.3d 1241, 1244 (9th Cir. 2009) (citation omitted). "The  
16 presumption against removal means that the defendant always has the  
17 burden of establishing that removal is proper." Id. (internal  
18 quotations omitted).

19 Under the "voluntary-involuntary rule" as articulated by the  
20 Ninth Circuit, "a suit which, at the time of filing, could not have  
21 been brought in federal court 'must remain in state court unless a  
22 voluntary act of the plaintiff brings about a change that renders  
23 the case removable.'" California v. Keating, 986 F.2d 346, 348  
24 (9th Cir. 1993) (quoting Self v. Gen. Motors Corp., 588 F.2d 655,  
25 657 (9th Cir. 1978)). The voluntary-involuntary rule "does not  
26 allow creation of diversity removal jurisdiction by court order  
27 dismissing the non-diverse defendant." Gould v. Mut. Life Ins. Co.  
28 of New York, 790 F.2d 769, 773 (9th Cir. 1986) (citing Self, 588

1 F.2d at 660).

2 An exception to the voluntary-involuntary rule exists if the  
3 non-diverse defendant was fraudulently joined in order to defeat  
4 removal. See Self, 588 F.2d at 659 ("[I]n the absence of a  
5 fraudulent purpose to defeat removal, the plaintiff may by the  
6 allegations of his complaint determine the status with respect to  
7 removability of a case . . . ."); Cava v. Netversant-National,  
8 Inc., No. 07-02597, 2007 WL 4326754, at \*3 (N.D. Cal. Dec. 7, 2007)  
9 ("Notwithstanding the 'voluntary-involuntary' rule, removal of a  
10 civil action that alleges claims against a non-diverse defendant is  
11 proper where it appears that such defendant has been fraudulently  
12 joined.").

#### 13 14 **IV. DISCUSSION**

15 Plaintiff argues in pertinent part that Standard's removal  
16 violated the voluntary-involuntary rule.<sup>4</sup> Mot. at 5. Standard  
17 contends that removal was proper because the Commissioner was  
18 fraudulently joined as a sham defendant to defeat federal diversity  
19 jurisdiction. Opp'n at 9. The Court agrees with Plaintiff and  
20 finds that removal of this action to federal court was improper.

21 Joinder of a resident defendant is fraudulent "if the  
22 plaintiff fails to state a cause of action against [the] resident  
23 defendant, and the failure is obvious according to the settled

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25 <sup>4</sup> Plaintiff also argues that Standard's removal was premature  
26 because the state court had not yet entered a formal, written order  
27 dismissing Plaintiff's claim against the Commissioner at the time  
28 Standard filed its Notice of Removal. Mot. at 7. Thus, according  
to Plaintiff, the Commissioner remains a party to the action. The  
Court does not reach this argument because it finds that removal  
was improper even if Plaintiff's claim against the Commissioner has  
been properly dismissed.

1 rules of the state." Morris v. Princess Cruises, Inc., 236 F.3d  
2 1061, 1067 (9th Cir. 2001). A removing defendant bears a heavy  
3 burden to establish fraudulent joinder "by clear and convincing  
4 evidence." Hamilton Materials, Inc. v. Dow Chemical Corp., 494  
5 F.3d 1203, 1206 (9th Cir. 2007). The court must resolve "all  
6 disputed questions of fact and all ambiguities in the controlling  
7 state law in favor of the non-removing party." Plute v. Roadway  
8 Package Sys., Inc., 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001)  
9 (internal quotations omitted).

10 Standard argues that this case falls within the fraudulent  
11 joinder exception to the voluntary-involuntary rule. Opp'n at 9.  
12 It contends that the settled law of California precludes a court  
13 from issuing a writ of mandamus to compel the Commissioner to  
14 revoke approval of an insurance policy. Id. at 4. Standard  
15 acknowledges that numerous federal courts in this district have  
16 held otherwise. See, e.g., Contreras v. Metro. Life Ins. Co., No.  
17 C-07-02597, 2007 U.S. Dist. LEXIS 90295, at \*21 (N.D. Cal. Nov. 29,  
18 2007); Sullivan v. Unum Life Ins. Co. of Am., No. C-04-00326, 2004  
19 WL 828561, at \*3 (N.D. Cal. Apr. 15, 2004); Branzina v. Paul Revere  
20 Life Ins. Co., 271 F. Supp. 2d 1163, 1172 (N.D. Cal. 2003).

21 Standard argues that each of these district court decisions relied  
22 on the same two inapposite cases -- Peterson v. Am. Life & Health  
23 Ins. Co., 48 F.3d 404, 410 (9th Cir. 1995) and Van Ness v. Blue  
24 Cross of Cal., 87 Cal. App. 4th 364, 371-72 (Ct. App. 2001) -- and  
25 thus reached the same erroneous conclusion. Opp'n at 5. Both  
26 Peterson and Van Ness stated in dicta that an insured may petition  
27 for a writ of mandamus requiring the Commissioner to revoke  
28 approval of a policy if the insured believes the Commissioner

1 abused his discretion in approving the policy under section  
2 10291.5.

3 In support of its position that the settled law of California  
4 bars Plaintiff's mandamus claim, Standard relies on Schwartz v.  
5 Poizner, 187 Cal. App. 4th 592 (Ct. App. 2010), and cites four  
6 state trial court orders sustaining demurrers by the Commissioner  
7 to similar claims.<sup>5</sup>

8 Standard's reliance on Schwartz is misplaced. Fraudulent  
9 joinder is determined as of the time the complaint was filed. Beck  
10 v. Starbuck's Corp., No. C-08-2930, 2008 WL 4298575, at \*2 (N.D.  
11 Cal. Sept. 19, 2008) (remanding case despite fact that after  
12 plaintiff filed his complaint the California Supreme Court issued a  
13 decision precluding liability against the non-diverse defendant).  
14 Schwartz was decided nearly five months after Plaintiff filed her  
15 FAC. Thus, even if Schwartz would preclude mandamus claims such as  
16 Plaintiff's -- which Plaintiff vigorously disputes -- it has no  
17 bearing on whether Plaintiff fraudulently joined the Commissioner  
18 in the instant action.

19 The trial court orders provided by Standard in which the  
20 Commissioner's demurrers to similar mandamus claims were sustained  
21 also fail to establish that there was a settled rule barring  
22 Plaintiff's mandamus claim when the FAC was filed. In her reply  
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24 <sup>5</sup> Standard asks the Court to take judicial notice of court orders  
25 sustaining demurrers by the Commissioner in the following cases:  
26 Harris v. Bank of Am., N.A., No. CGC-07-469393 (San Francisco Sup.  
27 Ct. 2008); Grotz v. Unum Group, No. CGC-09-485552 (San Francisco  
28 Sup. Ct. 2009); Martinez v. Standard Ins. Co., CGC-10-501948 (San  
Francisco Sup. Ct. 2010); Graybill-Bundgard v. Standard Ins. Co.,  
CGC-10-504747 (San Francisco Sup. Ct. 2011). See ECF No. 19-1.  
Pursuant to Federal Rule of Evidence 201, the Court GRANTS  
Standard's Request.

1 brief, Plaintiff provides three trial court orders denying the  
2 Commissioner's demurrers to identical claims.<sup>6</sup> It therefore  
3 appears to the Court that state courts are divided on the issue.  
4 At a minimum, it is far from "obvious according to the settled  
5 rules of the state" that Plaintiff's claim was invalid when filed.  
6 See Morris, 236 F.3d at 1067.

7 In light of the above, and the rule that ambiguities in the  
8 law must be resolved in favor of the non-removing party, the Court  
9 concludes that the Commissioner was not fraudulently joined and  
10 therefore GRANTS Plaintiff's Motion to Remand.

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25 <sup>6</sup> Plaintiff asks the Court to take judicial notice of court orders  
26 denying demurrers by the Commissioner in the following cases:  
27 Guyton v. Unum Life Ins. Co., No. CGC-02-415586 (San Francisco Sup.  
28 Ct. 2002); Glick v. Unumprovident Life Ins. Co., No. CGC-03-422858  
(San Francisco Sup. Ct. 2003); Contreras v. Metro. Life Ins. Co.,  
CGC-07-462224 (San Francisco Sup. Ct. 2007). See ECF No. 21. The  
Court GRANTS Plaintiff's Request.



1    **V.    CONCLUSION**

2            For the reasons stated above, Plaintiff Roya Ferdowsnia's  
3 motion to remand this case to the Superior Court of California,  
4 County of San Francisco, is GRANTED.

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6            IT IS SO ORDERED.

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8            Dated: May 10, 2011

  
UNITED STATES DISTRICT JUDGE